

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:PEN:PHI:502096-00  
KKRaup

date: **JUN 29 2000**

to: Pat Taylor-Moore  
Taxpayer Advocate's Office  
Room 7426, 600 Arch Street, Philadelphia, PA

from: District Counsel, Pennsylvania District,  
Philadelphia

subject: Taxpayer: [REDACTED]  
SS#: [REDACTED]  
Tax Year: [REDACTED]  
Request for Assistance

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. **This advice may not be disclosed to taxpayers or their representatives.**

This advice is not binding and is not a final case determination. Such advice is advisory and does not resolve the Service's position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

We are writing in response to your oral request for assistance in determining whether the Service has taken improper actions with respect to taxpayer [REDACTED] (the "taxpayer") for the taxable year [REDACTED]. We have set forth below a detailed history of the taxpayer's account so that you may understand our analysis of the case.

#### ISSUES

1. Whether the liabilities for income tax and addition to tax under § 6654(a) were properly assessed with respect to taxable year [REDACTED]?
2. Whether the Service sent a correct Notice and Demand to taxpayer pursuant to § 6303(a)?

#### CONCLUSIONS

1. The liabilities for income tax and addition to tax for taxable year [REDACTED] were properly assessed.
2. The Service did not send a correct Notice and Demand to taxpayer within 60 days of the date of assessment. The Service likely sent a correct Notice and Demand more than 60 days from the date of assessment.

#### FACTS

As determined from the administrative file which you provided to us, the following is a chronological history regarding assessment and collection activities with respect to liabilities for the taxable year [REDACTED].

On [REDACTED], taxpayer submitted a signed Form 1040 for [REDACTED] stating [REDACTED] income and requesting a refund of \$ [REDACTED] the entire amount of his withholding. Attached to the return was the Form W-2 and a two-page type-written statement which states, inter alia, that if the Service disagreed with his figures, that he should be audited. Taxpayer does not believe that wages are income which are subject to tax. Unfortunately, the Service processed the [REDACTED] return as a math error and, on [REDACTED], assessed the tax and interest believed to be due and owing, based on the Form W-2 attached to the return.

On [REDACTED], the Service sent the taxpayer a letter (CP 11) stating that the Service had changed his [REDACTED] income tax return by changing the income, total tax and the amount due.

At some point, the Service realized that the [REDACTED] was erroneously processed and on [REDACTED], the Service abated the assessment made on [REDACTED] and apparently processed the [REDACTED] return filed by taxpayer claiming that wages were not income and requesting a refund of all of his withholding.

Unfortunately, on [REDACTED], the Service sent the taxpayer a check for all of the taxpayer's withholding (\$ [REDACTED]) and interest on the withholding (\$ [REDACTED]).

On [REDACTED], the Service sent the taxpayer a thirty-day letter explaining the changes to the taxpayer's [REDACTED] return and proposing a deficiency. The Form 4549, Explanation of Tax Examination Changes, contains an error in that it gives taxpayer credit for withholding which had previously been returned to him. The letter erroneously advised taxpayer that he only owed \$ [REDACTED], giving credit to taxpayer for the \$ [REDACTED] in withholding already sent to him in [REDACTED]. Additionally, the Service asserted the failure to file penalty indicating that taxpayer's return was received on [REDACTED]. However, the return does not have a stamp on it and the txmod indicates that return was received by [REDACTED].

On [REDACTED], the Service received a letter dated [REDACTED] from the taxpayer, replying to the thirty-day letter. Taxpayer disagreed with the addition to tax under Section 6651(a)(1), the failure to file penalty, since he stated he had timely filed his income tax return. He provided copies of the certified mail receipt showing that the Service had received the return on [REDACTED]. Additionally, taxpayer demanded an in-person administrative hearing.

On [REDACTED], the Service sent taxpayer a letter apologizing for not reviewing his correspondence dated [REDACTED] (referring to letter dated [REDACTED] and actually received [REDACTED]) and advising that the Service would send a reply by [REDACTED].

On [REDACTED], taxpayer sent a letter advising the Service of his daytime telephone number.

It is unclear from the administrative file whether anyone from the Service telephoned the taxpayer. Apparently, no face-to-face meeting was scheduled with the taxpayer prior to the issuance of the notice of deficiency.

On [REDACTED], the Service sent taxpayer a notice of deficiency for the taxable year [REDACTED], asserting a tax liability of \$ [REDACTED] and additions to tax under Section 6654 and Section

6651(a)(1) in the amount of \$ [REDACTED] and \$ [REDACTED], respectively. The explanation of income tax changes contained the same errors as the thirty-day letter, which were giving taxpayer credit for withholding which had already been returned to him and asserting that the tax return was late-filed.

On [REDACTED], taxpayer attended a Problem Solving Day and spoke with Service employee Betty Landau. Ms. Landau referred the case to the Lancaster Examination Group since this was the location most convenient for the taxpayer. The case was assigned to Revenue Agent Nora L. Bliven. On [REDACTED], Ms. Bliven telephoned taxpayer. Taxpayer stated that he did not want to schedule an appointment since he was preparing a written response to the notice of deficiency.

Although taxpayer had been dealing with Ms. Bliven in Lancaster P.O.D., on [REDACTED], taxpayer wrote to Philadelphia Service Center regarding the notice of deficiency dated [REDACTED]. Taxpayer asserted that the notice of deficiency was invalid because: (1) the person signing the notice did not have delegated authority to sign the notice; (2) the notice was not signed in pen and ink and was not signed at all; and (3) he did not have an administrative hearing prior to the issuance of the notice of deficiency as demanded. The taxpayer also demanded that the Service send him legislative regulations which say that he must petition Tax Court for his deficiency to be reviewed.

On [REDACTED], Ms. Bliven of Lancaster Exam group telephoned taxpayer and scheduled a meeting with the taxpayer on [REDACTED].

On [REDACTED], taxpayer wrote to Ms. Bliven confirming their meeting set for [REDACTED] and demanding that the examiner from the Philadelphia Service Center who changed his [REDACTED] return also attend the meeting.

On [REDACTED], Ms. Bliven telephoned the taxpayer and left a message. She also wrote to the taxpayer confirming the meeting of [REDACTED].

On [REDACTED], taxpayer wrote to Ms. Bliven asking for a postponement of the meeting until the Service had "provided copies of all prima facie evidence that it has used in making its determination," "a list of all witnesses bearing personal knowledge of all the facts," and "summons all of its witnesses to be present" for the taxpayer's questioning. In the letter, taxpayer stated that he would need thirty days to review the evidence.

On [REDACTED], Ms. Bliven's supervisor, Mr. Carl Butler, sent taxpayer a letter responding to taxpayer's letter dated [REDACTED]. Mr. Butler explained that: (1) the case had been transferred to the Lancaster P.O.D. for the taxpayer's convenience; (2) the Service is not required to provide him with the information demanded in taxpayer's letter dated [REDACTED]; (3) that the primary document in the case is the Form W-2; (4) that wages are income subject to tax; and (5) that his argument that his return was timely-filed had merit. Finally, Mr. Butler advised taxpayer that taxpayer's only recourse was to file a petition in United States Tax Court and that Mr. Butler would be returning his file to the Problem Resolution Office in Philadelphia.

On [REDACTED], taxpayer telephoned Ms. Bliven and she confirmed that she had received his letter dated [REDACTED]. She also told the taxpayer that she would leave [REDACTED] open and that he could still come in if he wished.

Taxpayer did not appear on [REDACTED] for the meeting and Ms. Bliven closed out the file and returned it to the Problem Resolution Office in Philadelphia.

On [REDACTED], taxpayer wrote to Mr. Butler stating that the notice of deficiency was invalid because it was sent before taxpayer had a meeting with the Service and reiterating the arguments set forth in his letter dated [REDACTED].

On [REDACTED], taxpayer wrote to the Philadelphia Service Center submitting a Form 4852, purportedly correcting his Form W-2 and a sworn statement. Taxpayer asserts that wages are not income subject to tax.

On [REDACTED], the Service received a letter from Senator [REDACTED] asking for assistance with respect to the taxpayer and attaching taxpayer's letter to the Senator dated [REDACTED].

On [REDACTED], the Service assessed the liabilities set forth in the notice of deficiency including tax of \$ [REDACTED], late filing penalty under § 6651(a)(1) in the amount of \$ [REDACTED] and an estimated tax penalty under § 6654 in the amount of \$ [REDACTED].<sup>1</sup>

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<sup>1</sup>We note that no frivolous return penalty was assessed in connection with the [REDACTED] return even though the return is clearly frivolous. Frivolous return penalties were assessed for [REDACTED] and [REDACTED].

On [REDACTED], the Service sent taxpayer a notice advising that the Service had changed taxpayer's account. The notice indicated that taxpayer had a credit of \$ [REDACTED] for tax withheld, even though these monies had previously been returned to taxpayer. The notice demanded payment of \$ [REDACTED] for the [REDACTED] tax liabilities. The notice was sent to petitioner's last known address, [REDACTED], [REDACTED].

On [REDACTED], taxpayer wrote to the Service in response to the [REDACTED] notice asserting frivolous arguments such as that he does not have an "account" with the Service, that the notice of deficiency was invalid, and that he did not have taxable income since wages are not income.

From the transcript it appears that various notices were sent to the taxpayer seeking collection of the [REDACTED] tax liability. The balance listed on the notices erroneously included credit for the withholding that was previously sent to the taxpayer. In addition to some other notices, taxpayer would have received notices requesting payment on [REDACTED], [REDACTED], and [REDACTED]. These notices would have all requested a balance due which erroneously included credit for withholding which taxpayer had previously had sent to him.

On [REDACTED], taxpayer wrote the Philadelphia Service Center. Taxpayer was responding to the Notice of Intent to Levy (CP 504) and asserting that the Notice violated the Internal Revenue Code because: (1) the person sending the Notice of Intent to Levy did not have delegated authority; (2) taxpayer had not received a Notice and Demand; and (3) the Notice of Intent to Levy was not signed. Taxpayer reiterated his earlier arguments.

On [REDACTED], taxpayer wrote to the District Director asserting the same arguments asserted in his letter dated [REDACTED].

In [REDACTED], the Service realized that it had already returned withholding to taxpayer and the credit for withholding was reversed. Additionally, the late filing penalty was also abated.

On [REDACTED], taxpayer wrote to the Service Center Director and the Chief of Automated Collection Service, apparently in response to a Notice of Intent to Levy and Notice of Your Rights to a Collection Due Process Hearing (Letter 1058) dated [REDACTED], issued by ACS. An unsigned copy of the letter was received by the Office of Chief Counsel on [REDACTED]. Taxpayer asserted arguments regarding alleged procedural

violations occurring with respect to his [REDACTED] tax return. It is unknown whether the original letter was signed and whether ACS has treated this as a request for a Collection Due Process hearing, referring the case to Appeals. There is no 520 code in the txmod to indicate that Appeals has a CDP case under consideration.

On [REDACTED] taxpayer also wrote to [REDACTED] of the Taxpayer Advocate's Office in Philadelphia asking for an Assistance Order. It is unknown what action was taken in response to this letter. The current status of collection action is unknown.

### DISCUSSION

1. The assessment of tax and of the estimated tax penalty was proper for taxable year [REDACTED].

Taxpayer has essentially asserted that the assessments for tax and the estimated tax penalty for [REDACTED] are invalid because: (1) wages are not taxable income; and (2) the notice of deficiency was invalid. Taxpayer's arguments are frivolous.

It is well settled that wages are taxable income. See United States v. Connor, 898 F.2d 942, 944 (3rd Cir.), cert. denied, 497 U.S. 1029 (1990); Sauers v. United States, 771 F.2d 54, 66 fn. 2 (3rd Cir. 1985), cert. denied, 76 U.S. 1162 (1986); White v. Internal Revenue Service, 969 F. Supp. 321, 324-25 (E.D. Pa.), aff'd 135 F.3d 768 (3<sup>rd</sup> Cir. 1997).

The notice of deficiency in this case was valid. Taxpayer argues that it is not valid because: (1) the person signing the notice did not have delegated authority to sign the notice; (2) the notice was not signed in pen and ink and was not signed at all; and (3) he did not have an administrative hearing prior to the issuance of the notice of deficiency as demanded. Taxpayer's arguments are without merit.

The notice of deficiency contained a stamped signature of Joseph Cloonan, the Service Center Director. Mr. Cloonan is authorized to issue notices of deficiency. The Commissioner's authority to sign and send statutory notices is derived from the Internal Revenue Code and Treasury Regulations. Specifically, § 6212 authorizes the Secretary to determine whether there is a deficiency in income tax and, if so, to send the taxpayer a notice of such deficiency by certified mail. The term "Secretary" is defined in § 7701(a)(11)(B) as meaning the "Secretary of the

Treasury or his delegate." Section 7701(a)(12) defines "or his delegate" as "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." Treasury Regulation § 301.7701-9(b) provides that when a function is vested by statute in the Secretary of the Treasury or his delegate, the Treasury regulations provide that such function may be performed by, inter alia, the commissioner, and that such provision in the regulations or Treasury decision shall constitute a delegation by the Secretary of the authority to perform such function to the designated employee. Treasury Regulation §301.6212-1 provides that if a district director or director of a service center (or regional director of appeals), determines that there is a deficiency in respect of income tax, such official is authorized to notify the taxpayer of the deficiency by either registered or certified mail. Accordingly, Mr. Cloonan, as service center director, was authorized to issue the notice of deficiency.

Taxpayer's argument that the notice is invalid since it was not signed is also without merit. The Courts have found that a notice of deficiency does not need to be signed at all to be valid. See Tavano v. Commissioner, 986 F.2d 1389 (11<sup>th</sup> Cir. 1993); Brafman v. U.S., 384 F.2d 863, 865 n.4 (5<sup>th</sup> Cir. 1967); Commissioner v. Oswego Falls Corp., 71 F.2d 673, 677 (2<sup>nd</sup> Cir. 1934); Urban v. Commissioner, 964 F.2d 888 (9<sup>th</sup> Cir. 1992); Suttles v. Commissioner, 85 AFTR2d ¶ 2000-493. In Wessel v. Commissioner, 65 T.C. 273 (1975), the Tax Court, after finding that the employee did have delegated authority to issue the notice of deficiency, also noted that the fact that the notice was signed by a certain employee would not serve to invalidate the notice since petitioners received the notice and it advised them of respondent's determination. The Tax Court cited Commissioner v. Oswego Falls Corp., supra, for the proposition that a notice of deficiency need not be signed at all. The Court also cited language from Perlmutter v. Commissioner, 44 T.C. 382 (1965) aff'd 373 F.2d 45 (10<sup>th</sup> Cir. 1987), at 400 as follows:

It is axiomatic that the intent and purpose of the statutory requirement for the issuance of deficiency notices is to inform the taxpayer that the Commissioner means to assess additional taxes against him, and to provide time for the taxpayer to petition this Court for a redetermination if he is so advised....(taxpayers) petitions made it perfectly plain that they were not misled and enjoyed every privilege which a notice formally correct and issued\*\*\*would have given them. This being true, we

are unwilling to construe even a tax statute in the archaic spirit necessary to defeat these levies; the notices are only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this is unequivocally good enough.

The fact that taxpayer did not meet with the Service prior to the issuance of the notice of deficiency does not invalidate the notice. Compliance with the IRM, to the extent that it requires a procedure not specified in the tax code, is not mandatory. Urban v. Commissioner, *supra*; Luhring v. Glotzbach, 304 F.2d 560 (4<sup>th</sup> Cir. 1962) (failure to provide taxpayer with administrative conference did not invalidate the notice of deficiency); U.S. v. Horne, 714 F.2d 206, 207 (1<sup>st</sup> Cir. 1983) (manual's provisions are not mandatory); U.S. v. Will, 671 F.2d 963, 967 (6<sup>th</sup> Cir. 1982) (same).

2. The Service did not send a correct Notice and Demand within 60 days of the assessment for the taxable year [REDACTED].

Taxpayer raises many frivolous arguments that the Service may not take administrative collection action. However, upon review of taxpayer's file, we believe that, for reasons not raised by the taxpayer, the Service may be precluded from taking administrative collection action with respect to a portion of the 1996 tax liabilities because the Notice and Demand sent by the Service did not include a demand for payment of the entire tax liability. The Service may wish to only administratively collect the tax liability for which a Notice and Demand was made within 60 days of the date of assessment.

Section 6303(a) provides that the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of tax pursuant to § 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. The notice must state the amount and demand payment. U.S. v. McCallum, 970 F.2d 66 (5<sup>th</sup> Cir. 1992). Treas. Reg. 301.6303-1(a) provides that the failure to give notice within 60 days does not invalidate the notice. In the past, the Service has taken the position that the Service may take administrative collection action as long as a Notice and Demand went out to the taxpayer prior to the collection action. This position is based on the Treasury Regulation. Unfortunately, several courts have disagreed with the Service finding that a correct Notice and Demand must be sent within 60 days of assessments.

The Courts have held that where the Service fails to comply with the Section 6303(a) notice and demand requirement, the Service may not use its awesome nonjudicial collection powers (lien and levy). U.S. v. Jersey Shore State Bank, 781 F.2d 974 (3d Cir. Pa. 1986) aff'd 479 U.S. 442 (1987); U.S. v. Chila, 871 F.2d 1015 (11<sup>th</sup> Cir. 1989); U.S. v. Berman, 825 F.2d 1053 (6<sup>th</sup> Cir. 1987) on remand USTC 88-2 ¶9659 (S.D. Ohio 1988) after remand 884 F.2d 916 (6<sup>th</sup> Cir. 1989); Marvel v. U.S., 719 F.2d 150 (10<sup>th</sup> Cir. 1983); Blackston v. U.S., 91-2 USTC ¶ 50,585 (D.C. Md. 1991). The failure to send a proper notice and demand **does not** make the assessment void and the Service may still collect the tax by a civil suit. Id.

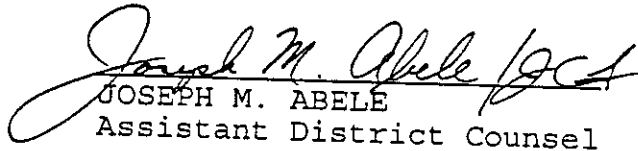
In this case, taxpayer received the Notice and Demand on [REDACTED]. The Notice and Demand erroneously gave credit to taxpayer for withholding that had already been returned to him. Thus, the amount demanded to be paid on the Notice and Demand was incorrect. Taking the conservative approach and following the holdings of the courts, this error does not invalidate the entire notice but rather precludes the Service from administratively collecting amounts (\$ [REDACTED] not set forth in the Notice and Demand which was sent within 60 days of the assessment. If the Service chooses this conservative approach and wishes to continue with nonjudicial collection actions, the Service may wish to credit taxpayer's account with the \$ [REDACTED] withholding which was erroneously returned to taxpayer so that the computer does not continue to issue collection notices which are incorrect. However, the Service may still collect the entire amount by civil action. Accordingly, if Collection believes that there is property from which the Service could collect the liability, they may prepare a civil suit recommendation. We could then refer the case to the Department of Justice for suit.

Alternatively, if the Service would like to take a more aggressive approach, we may rely on the Treasury Regulation and contend that the Service may collect the entire liability if the Service sent out a Notice and Demand which requested the total liability. We have not reviewed the collection file and do not know whether such a notice was ever sent.

If a determination is made that the account should be credited, a new Notice of Intent to Levy and Notice of Your Rights to Hearing (Letter 1058) may need to be issued. We would be happy to discuss that with the Collection employee assigned to the case after you have decided the course of action.

Finally, we note that we have not reviewed the collection file. We are concerned that the letter dated [REDACTED], should be construed as a Request for Due Process Collection Hearing even though the taxpayer has not completed the Form 12153. In the letter, taxpayer seeks a hearing because he does not agree with the proposed collection action. However, we can not make that determination unless we review the collection file, including the Letter 1058 and all correspondence regarding same. (Pursuant to Temporary Treasury Regulation 301.6330-1T(c), a taxpayer must make a written request for a CDP hearing within 30 days after the date of the CDP Notice. A written request in any form which requests a CDP hearing will be acceptable. Temp. Treas. Reg. 301.6330-1T(c)(2)(i) further provides that the request must include the taxpayer's name, address, and daytime telephone number, and must be signed by the taxpayer and dated.)

We would be happy to discuss this matter with you, or with any Service employee assigned to the case. If you have any questions regarding this matter, please feel free to contact attorney Kate Raup at (215)597-3442. We are closing our file and returning the administrative file.

  
JOSEPH M. ABELE  
Assistant District Counsel

Enclosures.

cc: Asst. Regional Counsel, Tax Litigation (NER) (w/out encl.)  
Asst. Chief Counsel (Field Service) (w/out encl.)  
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